Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE RIGHT OF A THIRD PERSON TO SUE UPON A CONTRACT MADE FOR HIS BENEFIT.

TO ask a question with regard to the right of a third person to bring a suit upon a contract suggests that there are two others whose rights are not in doubt. The use of the words "third person" (and they are those that naturally suggest themselves), implies that we admit that the contract is between two others, and that the third is a stranger. The rights acquired under a contract belong naturally to those who make it and to their assigns. The question suggested is whether a stranger may bring an action upon a contract made between others for his benefit. The idea of a contract is an agreement between parties giving rights to one against the other, and the elements of a contract upon which an action may be maintained at common law are, the agreement, the parties, and the consideration; and it is well settled as an old rule of law that the parties to a contract not under seal are the persons between whom the consideration moves. It is clear, therefore, that it is only between the parties that all the elements of a common-law contract exist, and that as a general rule the persons to bring suit upon a contract are the parties to the agreement and to the consideration.

It was said in an English case in 1861 that there were some old cases to the effect that a stranger to a contract may maintain an action upon it if he stand in such a relation to the contracting party that it may be said that the contract was made for his benefit, but that no modern case could be found in support of such an exception to the general rule.[1] The rule is distinctly laid down in the best English text-books,[2] and no such exception is admitted to exist. In this country, on the other hand, many cases have been decided on what is declared to be "the broad principle that, if one person make a promise to another for the benefit of a third person, that third person may maintain an action upon it;"[3] and in the Supreme Court of the United States Mr. Justice Davis said in

[1] Tweddle *v.* Atkinson, 1 B. & S. 393.

[2] Leake on Contracts, 222; Dicey on Parties, 82; 1 Addison on Contracts, *26.

[3] Per Denio, J., in Burr *v.* Beers, 24 N. Y. 178.

1876, "The right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country." [1]

It is important to know whether there is in fact such a difference between the law of this country and that of England on a question involving the elements of the law of contracts. Is it true that in this country it is a broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action upon it, and that in England the right to such an action is not admitted to exist even as an exception to the general rule that the person to sue upon a promise is the person to whom the promise was made? There may well be a difference between the two countries in the application of legal principles, or even in the modification of them by exceptions; but when there is a difference in the declaration of a general rule involving the very definition of a contract it provokes an inquiry into the principles out of which the rule should have come, and suggests a doubt whether or not there has been some mistake in the enunciation of the rule on the one side or the other.

It often happens in the development of the common law by means of precedents that some general rule is laid down in the decision of a particular case, without considering whether so general a rule is necessary for the right decision of that case, and then the decision of that case is considered as an authority for the general rule; and it is not until some other case arises in which the rule, although it plainly embraces the case, would clearly work injustice that the soundness of the rule begins to be questioned, or limitations are put upon the generality of its terms. The rules of the common law are deduced from the cases decided; but it is important not to formulate rules that are broader than is necessary to include the cases already decided, and it is particularly desirable that the judges should not declare general rules merely for the purpose of finding a ground of decision for a particular case which does not seem at first sight to fall in with existing rules of law. The rule is put in the syllabus of the report, and is repeated in the digests; then it is stated in the text-books as based upon the authority of the decision, and afterward, when it offers an easy solution of a difficult case, it is quoted by other judges upon the authority of the text-book, and so, without inquiry into its origin,

---

[1] Hendrick *v.* Lindsay, 93 U. S. 143.

it comes to be regarded as a rule of law; and it is only when it is applied to cases in which it works injustice that the soundness of the rule begins to be questioned.

It is no doubt true that there are many cases in which an action may be brought by the person for whose benefit the contract is made; but it by no means follows that it is a general rule of law that a stranger to a contract who has given no consideration for a promise has a legal right to recover damages for the non-performance of it, merely because the performance of it would have been beneficial to him. There are cases in which it has been held that the person for whose benefit it was intended that the promise should be performed might maintain an action upon it; but, in view of the well-known elements of contracts at common law, even such cases do not justify the declaration of a general rule without carefully considering upon what principles the liability rests in such a case, and whether the rule involves a change in our conception of the ground of legal liability arising out of agreements.

It is generally admitted that on a simple contract an action can be brought only by the parties to the contract; but it is said that on contracts not under seal a different rule may prevail. The law of sealed instruments expressed in technical form the idea of the common law with regard to liability upon obligations. These were originally the only obligations arising out of express agreement, and it was upon these that the technical law of express agreements grew up. The action on the case upon promises arose, not strictly out of agreements, but out of the relations and circumstances of the parties. A promise was often alleged for form's sake when in fact there was none, and if liability existed by reason of the circumstances, it was sometimes alleged to rest upon a promise when in fact it rested on something else. There were, therefore, early cases in which a right of action appeared to be based upon a promise made to another when in fact it rested upon a right to an accounting or upon a trust or a debt; and it was easy to cite these cases afterward as sustaining an action of assumpsit upon a promise to another, while admitting that on a sealed instrument no such action would lie. The law of the sealed instrument, however, is that which deals with the obligation arising out of the contract itself, and the principles of this law are equally applicable to contracts not under seal. The old and well-established conception is that the obligations of a contract belong to and rest upon those who enter into the contract. It is only the parties to it that

acquire rights against each other by means of it, and mutuality is one of the elements of the obligation. In the case of sealed instruments the affixing of the seal was the submission of the party to the legal obligation, and no inquiry into the consideration of the agreement was necessary; but in dealing with contracts not under seal, the English courts determined very early that they would not enforce mere promises without anything given in exchange. There must be mutuality; there must be parties who have dealt with one another, and one must have parted with something in order to acquire a right from the other. It is still undoubtedly the law that the existence of a consideration is necessary to the creation of a valid contract; and if this is so, it follows that a promise to do something for the benefit of a person is not binding without a consideration, and that if he has nothing to do with the consideration, he acquires no right under the contract so long as consideration is an element of the contract. It is only the parties to the consideration that are parties to the contract, and these alone acquire a right to sue for the breach of it. This is the general rule arising out of the nature of a contract as defined by the common law; and if in any case rights are acquired by a third person, it is necessary to look for something else than the promise to sustain the right to sue. To lay down the general rule that a third person may maintain an action upon a promise made for his benefit is to do away with one of the elements of a contract, and to introduce a new principle in creating obligations. The effect of such a rule would be to create obligations without mutuality, and to make binding promises which are not even agreements, for want of parties who agree with one another.

While the rule is in fact laid down in this general form, it is not seriously contended that it is of general application. No one would say that a stranger might in every case take advantage of a contract which if performed would incidentally inure to his advantage. If, for instance, a tenant, desiring to improve his land for his own convenience, were to make a contract with a builder to erect upon it a building which would constitute a fixture and belong to the landlord, no one would say that the landlord could sue the builder for not performing this contract.[1] Even under the law of Scotland, where consideration is not as important an element in a contract as it is in the law of England, the *jus tertii*, which is

1 This illustration was used by Lord Cranworth in Peddie *v.* Brown, Gordon, & Co., House of Lords, 1857, 3 Jur. N. S. 895.

recognized, is *jus quæsitum tertio*, a right intended to inure to the benefit of the third person;[1] and in some of those American cases in which the rule has been laid down that a stranger to a contract has a right to sue upon it, the rule has been in fact limited to cases in which the promisor and the promisee have both intended to secure the benefit to a third person, and in which also there has been some relation or obligation between the promisee and the party to be benefited which would give the latter some legal or equitable claim to the benefit of the promise.[2] It was such cases as this that gave rise to the rule, and although it is usually laid down in more general terms, it would be hard to find actual decisions in which the limitations did not exist.

It would carry us beyond the limits assigned to this article to examine all the cases and to see under what circumstances the rule is applied, and how far the actual decisions support the rule in its broadest form.

The cases are collected and arranged by States in an article in the "American Law Register," for September, 1890;[3] there is a thoughtful discussion of the subject with references to the cases in the "American Law Review," for April, 1881,[4] and the question is examined with especial reference to the New Jersey cases in the "New Jersey Law Journal," for July and August, 1881.[5]

It was pointed out by Judge Metcalf, in 1854, that the earlier cases in which the rule was declared did not warrant the assertion that the old rule of the common law had been changed, but that they were either cases like the old case of Dutton *v.* Poole,[6] in which the liability was based on the relationship of the parties, or cases of the use and occupation of land, like Brewer *v.* Dyer, then recently decided in Massachusetts,[7] or else cases of *indebitatus assumpsit* for money had and received, in which the action, "being an equitable one, can be supported by showing that the defendant has in his hands money which in equity and good conscience belongs

---

[1] Per Lord Cranworth in the case just quoted.

[2] Vrooman *v.* Turner, 69 N. Y. 280.

[3] 29 Am. Law Reg. (1st series), 596, Note to Grant *v.* Diebold Safe & Lock Co., by Ernest Watts.

[4] Am. Law. Rev. 231. Article by Henry O. Taylor.

[5] 4 N. J. Law Journal, 197, 229. Article by Edward Q. Keasbey. See also note to Casey *v.* Miller, 1 Am. Law Reg. & Rev. (N. S.) 20, on "What Promises to Pay the Debt of another are within the Statute of Frauds."

[6] 1 Ventris, 318; 2 Levinz, 211.

[7] 7 Cush. 337 (1851).

to the plaintiff, without showing a direct consideration moving from him or a privity of contract between him and the defendant." This decision of Judge Metcalf with respect to the general rule has been approved in Massachusetts, and Judge Gray (now a Justice of the Supreme Court of the United States) said in a later case,[1] "The general rule of law is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract; and consequently a promise made by one person to another for the benefit of a third, who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this commonwealth and in England have tended to uphold the rule and narrow the exceptions to it."

It will be seen by examining the earlier cases that most of them do fall within the classes suggested by Judge Metcalf, or else are cases in which the promise was really made to the plaintiff through a person acting in his behalf; and if there has been uncertainty in the early English cases, all that depart from the general rule have been distinctly overruled in England.[2]

One of the early cases in Massachusetts was Felton *v.* Dickinson,[3] in 1813. A master in taking a boy into his service agreed with the father to pay the boy a certain sum of money at the end of his term, and it was held that the son was entitled to an action for the money. The court said, "It is clear that the father had the son's advantage in view," and it may be added that the service for which the money was promised was performed by the boy. Another case was Arnold *v.* Lyman,[4] and here a debtor of the plaintiff had conveyed property to the defendant upon a written agreement that he should pay money to the plaintiff. This was a case of property received by the defendant, and a substitution of the plaintiff as creditor in the place of the person who conveyed the property. Hall *v.* Marston[5] was a case where a bill of exchange was sent from abroad to the defendant with instructions to pay a certain part of the proceeds to the plaintiff, and it was held that the plaintiff might bring an action. Brewer *v.* Dyer[6] was a case in which the defendant

[1] Exchange Bank of St. Louis *v.* Rice, 107 Mass. 37 (1871).

[2] Tweddle *v.* Atkinson, 1 B. & S. 393.

[3] 10 Mass. 287.

[4] 17 Mass. 400 (1821).

[5] 17 Mass. 575; Williams *v.* Everett. The English case below referred to was cited and distinguished.

[6] 7 Cush. 337.

had acquired from a lessee the use and occupation of land, and the landlord was held to be entitled to the rent agreed upon with the lessee. Dutton *v.* Poole was one of a number of early English cases in which the relationship of the person for whose benefit the promise was made was held to give him a right to sue upon the promise. It was, moreover, a case in which an heir of an estate had induced his father not to cut down timber in order to raise a portion for his sister upon a promise to pay the sister her portion; and the court held that the son, having had the benefit of the timber, was subject to an action by his sister and her husband for the money he had agreed to pay to her. The sister had lost her portion by reason of the promise of the defendant, and was in that sense a party to the consideration of the agreement made with her father for her benefit. The court, however, said, "It might be another case if the money had been to have been paid to a stranger, but there is such a nearness of relation between the father and child, and 't is a kind of debt to the child to be provided for, that the plaintiff is plainly concerned."[1] On the hearing of the case upon writ of error, the argument for the plaintiff was that "The action was maintainable by the party to whom the promise was made or to the *cestuy que use.* The promise was made indifferently;" and of this opinion were all the justices and barons.[2] Whatever the ground of the decision may have been, the result was an equitable one, and Lord Mansfield, who looked chiefly to such results, said in Martin *v.* Hind,[3] "It is difficult to conceive how a doubt could be entertained in Dutton *v.* Poole." The decision, however, rests upon the same ground as that in Rookwood's Case,[4] where the younger sons were allowed to bring an action for the amount the heir had promised the father he would pay to them if the father would charge their portions upon the land. The land was subject to an equitable charge, and the consideration for the promise really came from the plaintiffs.

There is an old case referred to in Bourne *v.* Mason,[5] as Sprat *v.* Agar, in the K. B. 1 Cro. 619, in which the nearness of the relation is said to give the plaintiff the benefit of the consideration of a promise made to another. It was the case of a promise to a physician to give money to his daughter in case he effected a certain

---

[1] Dutton *v.* Poole, 1 Vent. 318, 332; 2 Levinz, 211; T. Jones, 102.

[2] Dutton *v.* Poole, Raym. 302.

[3] 1 Cowp. 437; 1 Doug. 142.

[4] Cro. Eliz. 164.

[5] 1 Ventris, 6.

cure. And in Levet *v.* Hawes, which is found in Cro. Eliz. 619, it is held that a father cannot maintain an action on a promise made to him to pay a sum of money to his son on his marriage with the defendant's cousin. In Rippon *v.* Norton, Cro. Eliz. 849, it was also decided that the person to whom the promise was made for the benefit of his son could not maintain the action. The doctrine, however, that nearness of relation is sufficient to give the benefit of the consideration, though often referred to in the text-books, is not sustained by the early cases, and has no foundation in principle, and has been wholly repudiated in modern cases, both in England and in this country.

There are a good many early cases in which it is held that an action may be maintained by one for whose benefit money or goods have been given to another, though the promise to pay was not made to the plaintiff himself. In these the action was based upon the idea that there was a debt arising out of the receipt of the money or property, and that it was payable to the plaintiff. The defendant has received property charged with the debt, or has obtained money which he has agreed to pay to the plaintiff. No distinction was drawn between legal and equitable obligations, and the courts did not stop to consider whether, so long as the order was subject to be countermanded, the defendant was not legally liable to the other party. The later English cases and many American decisions have limited the right of recovery even in equity to cases in which the plaintiff has changed his position upon the strength of the stipulation,[1] and at law to cases where there is an acceptance of the order so that it cannot be revoked.[2]

The earlier cases, however, are fair examples of one of the classes referred to by Judge Metcalf as forming exceptions to the general rule with reference to parties to actions, and it will be found that these will furnish precedents for the later American cases without resorting to such a reversal of the general rule as to declare that a person for whose benefit a contract is made may maintain an action upon it.

Whorwood *v.* Shaw,[3] was an action of debt in which it was declared that Field had acknowledged to have received of one Prettie forty pounds to be equally divided between A and B and to their use. The action was brought by A, and one question was

---

[1] 1 Spence Eq. Jur. 280–286.

[2] Williams *v.* Everett, 14 East, 582 (1811).

[3] Yelverton, 23.

whether debt or account lay; and it was adjudged that, although there might be no contract between the parties, "uncore qt argent ou biens soit baile sur cond. al use, A, A poit aver det de ceo. issint est l'opinion Montague 28 H. 8, Dyer 20, 21 en Core et Woody's Case, et auxi un president de tiel action de det en le liure de entries, 45 Eliz. B. R."

In Starkey *v.* Mill,[1] a father gave goods to his son in consideration that the son should pay the plaintiff twenty pounds, and Roll, C. J., held on motion for arrest the declaration was good because there was not merely a debt by intendment, but a plain contract, because the goods were given for the benefit of the plaintiff. "Here is a promise in law made to the plaintiff, though there be not a promise in fact; there is a debt here and the promise is good."

In Oldham *v.* Bateman,[2] where the guardian of an infant paid J. S. £12 at the infant's request, and J. S. agreed to educate the infant and pay him £12 when he came of age, it was held that the infant was the proper person to bring suit for the money.

In all these cases there was money or property placed in the defendant's hands for the use of the plaintiff, and it was held that the plaintiff might sue for it as a debt.

On the other hand, where the action depended on a promise there are early cases in which the right of the person to be benefited to bring suit is denied.

In Evans *v.* Jampney, 24 Car. I., cited by Windham, J., in Dela Bar *v.* Gold,[3] A sold a house to B and in consideration thereof B promised to pay money to A and C.

In an action brought by them it was adjudged that there was no good consideration to C. In Bourne *v.* Mason[4] the case was distinguished from cases where the plaintiff did a meritorious act or was a near relation of the person to whom the promise was made; and it was held that he could not recover because he was a stranger to the contract.

Lord Holt, in Eland *v.* Yard,[5] and Buller, J., in Marchington *v.* Vernon,[6] laid it down as a rule that "on a promise not under seal

[1] Style, 296; 1 Viner's Abr. 333, *sub nom.* Starkey and Mylne.

[2] 1 Rolle Abr. 31, pl. 8; 1 Viner's Abr. 334.

[3] Keb. 64. There is a long discussion of the subject in Dela Bar *v.* Gold, Keb. 44, 63, but no decision.

[4] 1 Ventris, 6, 20 & 21 Car. II. in B. & R.

[5] 1 Ld. Raym. 368.

[6] 1 Bos. & Pul. 101, note.

made by A to B for a good consideration to pay B's debt to C, C may sue A." This was not supported by authority at the time nor necessary to the decision, but it has since been copied from one text-book to another, and quoted in the cases until it has begun to bear the appearance of authority in itself; but in Crowe *v.* Rogers,[1] decided a few years afterward, this doctrine was distinctly repudiated.

The plaintiff had a claim against H for a debt of £70. The defendant promised H that if he would make a title for him he would pay the plaintiff the £70. On demurrer to a declaration alleging these facts it was held that the plaintiff could not recover, because the consideration moved from H, and not from the plaintiff. This was approved and followed in Price *v.* Easton.[2] The declaration stated that W. P. owed the plaintiff £13, and that it was agreed between W. P. and the defendant that if the defendant would work for him and leave his wages in his hands, he the defendant would pay the plaintiff the money due to him from W. P.; and there was an averment that W. P. had performed his part of the agreement. After a verdict for the plaintiff, judgment was arrested, and Littledale, J., said, "This case is precisely like Crowe *v.* Rogers, 1 Strange, 592, and must be governed by it."

In Williams *v.* Everett,[3] where bills were remitted from the Cape of Good Hope to the defendants in London, to be paid in certain sums to various persons, and the defendants declined to hold the money for the purpose, but did in fact collect the money, it was held that an action would not lie against them by the persons to whom the money was to be paid. It was open to the remitter to countermand the order until the receiver had made some engagement with the person to whom the money was to be paid; but in Lilly *v.* Hayes,[4] where the receiver of the money admitted that he held it to the plaintiff's use, and the plaintiff by his authority was notified of this, it was held that the plaintiff might recover the money from him in an action for money had and received, and that he could not allege want of consideration moving from the plaintiff. In this case the defendant had actually made himself the agent or banker of the plaintiff, and the right of action arose out of this relation of trust and not out of any promise made to another.[5]

---

[1] 1 Strange, 592 (1724).
[2] B. & Ad. 433.
[3] 14 East, 582 (1811).
[4] 5 A. & E. 584 (1826).
[5] With reference to the distinction between Lilly *v.* Hayes, and Williams *v.* Everett and similar cases, see the notes to Lampleigh *v.* Brathwait, 1 Smith Ldg. Cas. 271 and

In Tweddle *v.* Atkinson,[1] the question was distinctly raised whether one for whose benefit an express promise was made might bring an action upon it if he were a stranger to the consideration. It was, like Dutton v. Poole, the case of a promise made by a father for the benefit of his child. After a marriage, the fathers of a husband and wife agreed together each to pay a sum of money to the husband, and they also agreed that they should have the right to sue for the parties at law. It was nevertheless decided that the husband had not a right of action. Crompton, J., said: "It is admitted that the plaintiff cannot succeed unless the case is an exception to the well-established doctrine of the action of assumpsit. Modern cases have overruled the old decisions. They show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."

This is the established law in England to-day, and the same rule is distinctly declared by many courts of the American States, as it was expressed in the decision of Judge Gray in Massachusetts.[2] In other States, however, the courts, in deciding cases that came within the classes referred to by Judge Metcalf (cases of money had and received, or in which there was a trust or a right to an accounting), have referred to the old cases, and declared that it had been decided that if one make a promise to another for the benefit of a third, the latter may maintain an action upon it. Dutton *v.* Poole, and the language of Lord Holt have been quoted by one court after another as authority to this proposition; and Mr. Parsons, in his work on Contracts,[3] referring to Dutton *v.* Poole and to early cases in Massachusetts and Pennsylvania, and some others, said the rule was more positively asserted in this country, and that it might be safe to consider it the prevailing rule with us. After this Mr. Parsons himself was referred to as authority, and it has been frequently declared to be "well settled as a general rule that in cases of simple contracts, if one person makes a promise for the benefit of a third, the third may maintain

---

288, 8th Am., from 8th Eng. ed. See also Howell *v.* Batt, 5 B. & Ad. 504 (1833); Baron *v.* Husband, 4 B. & Ad. 611 (1833).

[1] 1 B. & S. 393.

[2] Exchange Bank of St. Louis *v.* Rice, 107 Mass., quoted above.

[3] 1 Pars. on Cont. 467.

an action upon it, though the consideration does not move from him."[1]

It would take too long to refer to the cases in detail, but it may be safely said that the rule is seldom in fact applied, except in cases where the promisor and the promisee have both intended to confer the benefit on the person who brings the action, or where the person who sues is the only person who is interested in the performance of the contract, or cases of money paid to one for the use of another, or cases where one having money for another agrees to pay it to a third.[2] The Supreme Court of the United States, in a later case than that referred to in the beginning of this article, distinctly declares the general rule to be that privity of contract is necessary to the maintenance of an action of assumpsit, but says there are confessedly many exceptions to it.[3] "One of these, and by far the most frequent one," says Mr. Justice Strong, "is the case where, under a contract between two persons, assets have come into the promisor's hands, or under his control, which in equity belong to a third person. In such a case it is held that the third person may maintain an action in his own name; but then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or to deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue;" and it was held that the holders of coupon bonds could not maintain an action against one who had agreed with the maker of the bonds to assume the payment of them.

The contrary conclusion was reached by the Court of Appeals in

---

[1] Joslin *v.* N. J. Car Spring Co., 36 N. J. Law, 141; Farley *v.* Cleveland, 4 Cow. 432, 9 Cow. 639; Lawrence *v.* Fox, 20 N. Y. 268; 93 U. S. 143.

[2] See American Note to Lampleigh *v.* Brathwait, 1 Smith Ldg. Cas. 288, 8th ed., and the articles above referred to in 29 Am. Law Rev. (New Series), 596; 15 Am. Law Rev. 231.

[3] Nat. Bank *v.* Grand Lodge, 98 U. S. 123 (1878).

New York in a similar case, because the court, instead of abiding by the common-law rule of privity of contract, assumed it to be a broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action upon it. This rule had been declared in Farley *v.* Cleveland,[1] and Lawrence *v.* Fox,[2] and in Burr *v.* Beers,[3] and Denio, J., applying the rule (which he did not approve of), felt obliged to hold that an action at law might be maintained by a mortgagee against one who had assumed the payment of the mortgage. No injustice was done in the particular case because the defendant was in fact liable in equity; but in the next case of the kind that came before the court it appeared that the deed in which the mortgage debt was assumed was itself a mortgage which had been paid, so that the defendant was not liable in equity to the plaintiff nor to any one else, and the court had great difficulty in reconciling the doctrine of Burr *v.* Beers with the justice of the case, and was obliged to say that the doctrine did not apply to such a case.[4] Again, in Vrooman *v.* Turner,[5] where the person to whom the agreement of assumption was made was not himself liable on the mortgage, the court held that the doctrine must be confined to cases where there is "first, an intent by the promisee to secure some benefit to a third person; and secondly, some privity between the two, the promisee and the party to be benefited."

In New Jersey, where the doctrine of Lawrence *v.* Fox and Dutton *v.* Poole had been casually recognized by the Supreme Court,[6] the Court of Chancery was urged to apply it to the case of the assumption of a mortgage after the person assuming it had conveyed the premises back again to the original debtor, who had again assumed the payment of the mortgage debt.[7] The court avoided any criticism of the Supreme Court by saying that the rule that a third person may sue upon a contract did not apply to contracts under seal, and that the liability of the grantee of a deed was regarded in New Jersey as a liability under a sealed instrument,[8] and the vice-chancellor put the liability of the person who assumes a mortgage entirely upon equitable grounds. This deci-

---

[1] 4 Cow. 432 (1825); id. 639 (1827).
[2] 20 N. Y. 268 (1859).
[3] 24 N. Y. 178.
[4] Garnsey *v.* Rogers, 47 N. Y. 233.
[5] 69 N. Y. 280.
[6] Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141.
[7] Crowell *v.* Currier, 27 N. J. Eq. 152.
[8] Finley *v.* Simpson, 2 Zab. (22 N. J. Law) 311.

sion was affirmed by the Court of Errors and Appeals on the same grounds,[1] and although the court said that in some cases actions of assumpsit might be maintained on a promise made by the defendant to a third person without any consideration moving between the parties, and that no such rule existed with respect to sealed instruments, yet it is obvious that the decision in this case must have been just the same, whether the agreement to assume the mortgage had been in a simple contract or a deed under seal. The liability to such an agreement does not rest upon a promise to a third person, but upon equitable considerations arising out of the fact that the property is held subject to an existing liability to pay the debt.

If the liability arose out of the promise, then it could not be affected by any new agreement between the original parties or change in their relations.

These cases are in themselves enough to show that what is called the prevailing American rule is not in fact a general rule of law, and that the principles applicable to those cases in which a suit is brought by one for whose benefit a contract is made, ought not to be expressed in this general form. There is no need of so broad a rule, nor is it necessary to declare any rule that is contrary to the established principles of the law of contracts at common law.

It is sufficient to decide each case upon principles which apply to it, and will be found that the result of the decisions will not require the enunciation of a rule giving strangers to contracts a right to sue upon them.

Edward Quinton Keasbey.

NEWARK, N. J., May 8, 1894.

---

[1] Crowell *v.* Hospital of St. Barnabas, 27 N. J. Eq. 650.